

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.833 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE MR.JUSTICE S.R.BRAHMBHATT

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

PATEL BABULAL RAMDAS & ANR.

Versus

THE STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 833 of 2005
MR YF MEHTA with MR AM PAREKH for Appellants
MR HL JANI, APP for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE MR.JUSTICE S.R.BRAHMBHATT

Date of decision: 12/05/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Admitted.

Mr.H.L.Jani, learned Additional Public Prosecutor, waives service of notice on behalf of the respondent. This appeal was heard on different dates as is evident from order-sheet and having heard it finally today, it is proposed to be disposed of by this judgment.

2. By filling instant appeal under Section 374(2) of the Code of Criminal Procedure, 1973 ("the Code" for short), the appellants, who are original accused Nos.2 & 4, have challenged judgment dated April 8, 2005 rendered by the learned Additional Sessions Judge, 4th Fast Track Court, Patan, in Sessions Case No.143 of 2002 by which they have been convicted under Section 307 read with 149 as well as Section 323 read with 149 of Indian Penal Code ("IPC" for short), and each sentenced to suffer R.I. for ten years and fine of Rs.10,000=00, in default R.I. for two years, for commission of offence punishable under Section 307 read with 149 IPC as well as R.I. for one year and fine of Rs.1,000=00, in default R.I. for three months, for commission of offence punishable under Section 323 read with 149 IPC.

3. The facts emerging from the record of the case are as under:

Anandi, who is daughter of Lalbhai - elder brother of complainant Rameshbhai, had gone to field for the purpose of collecting fodder. At that time, the original accused No.29, i.e. Bhailalbhai Babaldas, had given stick blow on her head. Therefore, a complaint was filed against Bhailalbhai Babaldas regarding the said incident. Filing of complaint against accused Bhailalbhai Babaldas had annoyed the appellants and others. The incident in question took place on September 22, 1995. On the day of incident, complainant Rameshbhai Balchandbhai and his elder brother Lalbhai were returning home from their orchard in the morning. When they reached open square near Dudh-Mandli, they found the appellants and other accused lying in wait, armed with different weapons. On sighting the complainant, the members of unlawful assembly started raising shouts to assault and kill the complainant. The case of the complainant is that Govindbhai Patel, i.e. accused No.1, gave axe blow on the head of the complainant whereas Hargovanbhai Patel, i.e. accused No.8, gave axe blow on his right hand. Further, Chhanabhai Kanjibhai, i.e. original accused No.4 - appellant No.2 herein, as well as Bhailalbhai Babaldas, i.e. original accused No.29, and Dipakbhai Shivrambhai, i.e. original accused No.21, delivered blows with their respective sticks on left hand of the complainant. As the complainant was assaulted, he raised shouts to save him.

Thereupon, his elder brother Lalbhai attempted to rescue him. The original accused No.18, i.e. Shambhudas Hirdas, caused injury with stick on right hand wrist of Lalbhai and the original accused No.8, i.e. Hargovandas Hirdas, caused injury on left hand of Lalbhai with a stick whereas the original accused No.4, i.e. the appellant No.1 herein Chhanabhai Kanjidas, caused injury on right hand elbow of Lalbhai and original accused No.9, i.e. Shankerbhai Ramdas, and original accused No.17, i.e. Babubhai Kanjibhai, caused injury with stick on waist of Lalbhai whereas original accused No.19, i.e. Shivram Ramchandbhai, and original accused No.11, i.e. Dahyabhai Hirdas, caused injury by stick on left hand of Lalbhai. As both the brothers were assaulted by several persons with their respective weapons, they raised shouts for help. Thereupon, witness Vithaldas Babaldas Patel went to the rescue of two brothers. Vithalbhai was assaulted by the original accused No.2, i.e. Babubhai Ramdasbhai the appellant No.1 herein, with an axe and an injury was caused on his head. The appellant No.2 herein, i.e. original accused No.4, caused injury on right hand of Vithalbhai by means of a stick whereas original accused No.28, i.e. Bhailalbhai Babaldas, and original accused No.21 Dipakbhai Shivramdas caused injury on left hand of Vithalbhai by delivering stick blows and original accused No.10, i.e. Chaturbhai Prahladbhai, assaulted witness Vithalbhai with a dharia, which injured little finger of his right hand. On commotion being raised, complainant's sister-in-law Dahiben and niece Anandi as well as Champaben, sister of injured Vithalbhai, also came to their rescue, but they were also beaten with sticks. Witness Dahiben Lalbhai was given two stick blows on her waist by original accused No.11, i.e. Dahyabhai Hirdas, whereas original accused No.20, i.e. Bhailalbhai Manilal, also assaulted her with stick. Witness Champaben Babaldas, who is sister of injured Vithalbhai, was caused injury on her left hand wrist by original accused No.18 Shambhubhai Hirabhai by means of a stick whereas Anandiben Laljibhai, who is niece of complainant Rameshbhai and daughter of injured Lalbhai was caused injury on both her thighs with sticks by original accused No.29, i.e. Patel Bhailalbhai Babaldas, and original accused No.21, i.e. Dipakbhai Shivram. The complainant was so scared that he took shelter in slop of one Babubhai Laljibhai. On commotion taking place, village people rushed to the scene of offence and only thereafter, the accused left the place of incident. The complainant and other injured were removed to Government Hospital, Bechraji, for treatment. At Bechraji Hospital, complaint of complainant Rameshbhai was recorded. As the complainant and his brother Lalbhai as well as Vithalbhai received serious injuries, they were

removed to Mehsana Government Hospital for better treatment. The complaint lodged by Rameshbhai was duly investigated by Mr.A.J.Gondaliya, who was then Police Sub Inspector of Bechraji Police Station. After necessary investigation, the appellants and other twenty-nine accused were chargesheeted in the Court of learned Judicial Magistrate First Class, Chansma, for commission of offences punishable under Sections 307, 323 read with 149 IPC etc. As the offence punishable under Section 307 IPC is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Patan, for trial where it was numbered as Sessions Case No.143 of 2002.

4. The learned Additional Sessions Judge to whom the case was made over for trial, framed necessary charge against the accused. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) complainant Rameshbhai Balchanddas Patel as P.W.-1 at Exh.52; (2) injured Lalchandbhai Balchanddas Patel as P.W.-2 at Exh.56; (3) injured Vithalbhai Babaldas Patel as P.W.-3 at Exh.58; (4) injured Anandiben Laljibhai Patel as P.W.-4 at Exh.60; (5) injured Dahiben Lalbhai Patel as P.W.-5 at Exh.61; (6) injured Champaben Babaldas Patel as P.W.-6 at Exh.62; (7) Mahendrakumar Laljibhai Patel as P.W.-7 at Exh.65; (8) Babubhai Maljibhai Patel as P.W.-8 at Exh.66; (9) Keshavlal Cheldas Patel as P.W.-9 at Exh.67; (10) Karshanbhai Chhaganbhai Patel as P.W.-10 at Exh.71; (11) Rameshbhai Shambhudas Patel as P.W.-11 at Exh.79; (12) Vithlbhai Narandas Patel as P.W.-12 at Exh.83; (13) Medical Officer Dr.Pravinkumar Popatlal Soni as P.W.-13 at Exh.89; (14) Tursangji Gopalji as P.W.-14 at Exh.95; (15) Satishkumar Jayantilal as P.W.-15 at Exh.97; (16) Bhanuprasad Shivram Joshi as P.W.-16 at Exh.99; (17) Medial Officer Shobhaben Madanlal Gupta as P.W.-17 at Exh.101; (18) Ashwinkumar Jamnadas Gondaliya as P.W.-18 at Exh.122; (19) Narpatsinh Dolatsinh Jetavat as P.W.-19 at Exh.138; and, (20) Chandulal Tribhovandas Panchal as P.W.-20 at Exh.139, to prove its case against the accused. The prosecution also produced documentary evidence such as panchnama of place of incident at Exh.68; panchnama regarding seizure of clothes of the complainant and the witnesses at Exh.78; panchnamas indicating recovery of weapons at Exhs.80, 96 & 98; certificate indicating injury sustained by Rameshbhai Balchanddas at Exh.90; certificate indicating injury sustained by Vithalbhai Babaldas at Exh.91; certificate indicating injury sustained by Laljibhai Balchandbhai at Exh.92; certificate indicating injury sustained by Anandiben Laljibhai at Exh.93; certificate indicating injury sustained by Champaben Babaldas at Exh.94; x-ray plates at Exhs.104 to 109;

extract from Station Diary maintained at Bechraji Police Station at Exh.123; etc. in support of its case against the accused.

5. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the accused the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code. In their further statements, the case of each accused was that of total denial. No defence evidence was adduced by any of the accused.

6. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution that at 7.00 a.m. on September 22, 1995, the accused Nos.1, 2, 4, 5, 7, 9, 10, 11, 15, 17, 18, 19, 20, 21, 23, 28 and 29 had formed an unlawful assembly common object of which was to attempt murder of complainant Rameshbhai as well as to cause injuries to the witnesses and in prosecution of the common object, the members of unlawful assembly had caused injuries to the complainant and witnesses, who had attempted to rescue the complainant, as a result of which, commission of offences punishable under Section 307 r.w. 149 IPC as well as Section 323 r.w. 149 IPC is established. The learned Judge thereafter heard the accused and their counsels on the question of sentence and has imposed sentences on them which are referred to earlier vide judgment dated April 8, 2005, giving rise to instant appeal.

7. Mr.Yogesh F.Mehta, learned counsel of the appellants, contended that except the complainant, presence of the appellants at the time of incident is not referred to by other injured witnesses at all and, therefore, the learned Judge of the trial Court was not justified in coming to the conclusion that the appellants were members of the unlawful assembly. The learned counsel emphasised that even if the Court comes to conclusion that the appellants were members of unlawful assembly, there is no evidence on record to establish that commission of offence was such which the appellants as the members of that assembly knew was likely to be committed in prosecution of common object and, therefore, invocation of Section 149 IPC to the facts and circumstances of the case is erroneous. According to the learned counsel of the appellants, what is alleged by the complainant is that the appellant No.2 had given blow with stick on his left hand, but that would not show that the appellant No.2 had made attempt to murder him and, therefore, conviction of the appellant No.2 under Section 307 r.w. 149 IPC

deserves to be set aside. The learned counsel of the appellants pointed out that in absence of intention and knowledge, which are necessary ingredients of Section 307 IPC, there cannot be an attempt to commit offence of murder and, therefore, the impugned judgment deserves to be set aside. What was asserted was that the learned Judge of the trial Court has failed to appreciate the evidence on record in its true perspective and, therefore, the appeal should be accepted. In the alternative, it was argued that in any view of the matter, imposition of R.I. for ten years for commission of offence punishable under Section 307 r.w. 149 IPC is not warranted at all and, therefore, the same should be reduced to R.I. for five years. In support of the contentions advanced at the Bar, the learned counsel of the appellant has placed reliance on decisions rendered in (1) Anil Rai v. State of Bihar, A.I.R. 2001 SC 3173; and (2) Parshuram Pande & Ors. v. State of Bihar, A.I.R. 2004 SC 5068.

8. Mr.H.L.Jani, learned Additional Public Prosecutor for the State, contended that the testimony of complainant, which is truthful and trustworthy, indicates that the appellants and others had formed an unlawful assembly, common object of which was to cause murder of the complainant and in prosecution thereof, the complainant was assaulted by the appellants, as a result of which, conviction of the appellants under Section 307 r.w. 149 IPC cannot be regarded as erroneous. It was pleaded that the evidence on record clinchingly establishes that all the accused armed with different weapons were lying in wait for the complainant and had assaulted him on sighting him. It was further pointed out that the complainant was injured on his head and different parts of the body, and the appellants had even not spared those who had attempted to rescue the complainant as a result of which the trial Court was justified in coming to the conclusion that common object of members of the unlawful assembly was to attempt murder of the complainant. The learned Additional Public Prosecutor for the State drew attention of the Court to the decision of the Supreme Court in State of Maharashtra v. Balram Bama Patil & Ors., A.I.R. 1983 SC 305, and contended that to justify conviction under Section 307, it is not essential that bodily injury capable of causing death, should have been inflicted and, therefore, the plea that the appellant No.2 had caused injury on hand of the complainant is of no avail. The learned counsel for the State contended that the testimony of injured complainant gets complete corroboration from medical evidence on record as well as evidence of other injured witnesses and, therefore, well-reasoned conviction should be upheld by this Court.

The learned counsel for the State further argued that cogent and convincing reasons have been given for imposition of R.I. for ten years for commission of offence punishable under Section 307 read with 149 IPC and as no ground is made out by the learned counsel of the appellants to interfere with the impugned judgment, the appeal, which lacks merits, should be dismissed.

9. This Court has heard Mr.Yogesh F.Mehta, learned counsel of the appellants, as well as Mr.H.L.Jani, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the evidence on record produced by the learned counsel of the appellants for scrutiny of this Court with reference to broad and reasonable probabilities of the case.

10. As noticed earlier, in order to prove its charge, the prosecution has relied upon the testimony of witness Rameshbhai Balchanddas, recorded at Exh.52. This witness in his testimony has stated that the incident had taken place on September 22, 1995. According to him, at about 7.00 in the morning, he was returning home with his elder brother Lalbhai. The witness has stated that when they reached open square near Dudh-Mandli, he found all the accused present armed with different weapons. The witness has stated that accused No.1 Govindbhai Kantibhai gave blow with an axe on his head whereas accused No.8 Hargovanbhai Hirdas caused injuries to him on his hand with an axe and accused No.4, i.e. the appellant No.2 herein - Chhanabhai Kanjibhai, gave blow with stick on his left hand whereas accused No.29 Bhailalbhai Babaldas and accused No.21 Dipakbhai Shivramdas also caused injuries to him on his left hand by means of their sticks. The witness has further stated that thereafter, his brother Lalbhai had come to his rescue, but the accused beat his elder brother also. Elaborating the same, the witness has stated that Shambhubhai Hirdas, i.e. accused No.18, gave stick blow on right hand wrist of his brother whereas accused Hargovanbhai gave stick blow on left hand of his brother and accused Chhanabhai Kanjibhai, i.e. accused No.4 - the appellant No.2 herein, gave blow on right hand elbow of his brother and accused Shankerbhai Ramdas, i.e. accused No.9, and accused Babubhai Kantibhai, i.e. accused No.17, also gave blow with sticks on waist of his brother. It is further asserted by this witness that thereafter, accused Dahyabhai Hirdas, i.e. accused No.11, and Shivabhai Ramchandbhai, i.e. accused No.19, gave stick blow on left hand elbow of his brother. According to this witness, on assault being mounted on him and his

brother, they raised shouts and, therefore, Vithalbhai came to their rescue, but accused Babubhai Ramdas, i.e. original accused No.2 - the appellant No.1 herein, caused injuries to Vithalbhai by means of an axe whereas accused Chhanabhai Kanjibhai, i.e. original accused No.4 - the appellant No.2 herein, gave stick blow on right hand of Vithalbhai. It is also stated by the witness that thereafter, Vithalbhai was assaulted by Bhailalbhai, i.e. original accused No.28, and Dipakbhai Ramdasbhai, i.e. original accused No.21, by means of sticks whereas accused Chaturbhai, i.e. original accused No.10, caused injury on right hand palm of Vithalbhai by means of an axe. The witness has further stated that on hearing their shouts, his sister-in-law Dahiben, i.e. wife of his brother Lalbhai, and his niece Anandi as well as Champaben Babaldas, i.e. sister of injured Vithalbhai, also came to their rescue, but his sister-in-law Dahiben, niece Anandiben and Champaben were assaulted by stick and injured. What is mentioned by the witness is that on receiving injury, he himself, Vithalbhai and Lalbhai fell down and, thereafter, all the accused dispersed. According to this witness, the motive for commission of crime was that Anandiben who is daughter of his elder brother Lalbhai, was assaulted by accused No.29 Bhailalbhai with stick on her head as a result of which, a complaint was filed and, therefore, to take revenge, they were assaulted.

10.1 In his cross-examination, the witness has denied the suggestion made by the defence that before lodging complaint, he took assistance of Mr.D.R.Patel, who was appointed as Dy.S.P.. The suggestion made by the defence that the complaint was lodged by him in consultation with his two brothers, is also denied by him. The suggestion made by the defence that the names of the accused were disclosed after deliberations, is also denied by him. The suggestion made by the defence that he was not knowing as to who caused injury to him, but gave the names of the accused out of enmity is also denied by him. Certain minor omissions have been brought on record with reference to his complaint, which are found in paragraph 3 of his cross-examination. In his cross-examination also, the witness has maintained that he saw the accused waiting to assault him from a distance of 10 feet. The suggestion made by the defence that along with accused, there were forty to fifty persons, is denied by the witness. In his cross-examination also, the witness has mentioned that on sighting him, immediately assault was mounted on him by the members of unlawful assembly. During the cross-examination, it was explained by the witness that he sustained injuries on five different parts of his person.

It is also maintained by this witness in his cross-examination that Vithalbhai came to his rescue within two minutes of raising shouts by him.

10.2 This is all what transpires from the testimony of complainant Rameshbhai. On reappraisal of evidence of complainant Rameshbhai, this Court finds that he has tendered evidence in normal manner without making noticeable improvements and/or embellishments. Though this witness has been cross-examined at length, nothing could be brought on record so as to impeach his credibility. The witness knows the accused. Therefore, mistake in identifying the appellants and others as his assaulters and also assaulters of injured witnesses stand totally ruled out. It could not be brought on record that this witness was on inimical terms with any of the accused. It is relevant to notice that the witness has sustained several injuries. Therefore, his presence at the place of incident can hardly be doubted. Normally, an injured would not allow the real culprit to go scot-free and involve innocent persons falsely in a serious offence without motive. The testimony of this witness gets complete corroboration from the medical evidence of Dr.Pravinkumar Popatlal Soni, which is recorded at Exh.89. The Doctor in his substantive evidence before the Court has stated that he examined complainant Rameshbhai Patel on September 22, 1995 at 7.40 a.m. and found five injuries on him. The Medical Officer in his testimony has, in no uncertain terms, stated that injuries sustained by the complainant were possible by hard and blunt substance. Further, this witness stands corroborated by evidence of other injured witness. Under the circumstances, the learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses, did not commit any error in placing reliance on the testimony of complainant Rameshbhai while determining guilt or otherwise of the appellants and others.

11. Though this Court does not propose to reproduce evidence of other injured witnesses in great detail, it would be worthwhile to notice essential features emerging from their evidence. Injured witness Lalchandbhai Balchanddas Patel examined at Exh.56 has stated that when he in the company of his brother Rameshbhai was returning home at 7.00 a.m. on September 22, 1995, he and his brother were assaulted by the accused. The witness has mentioned in his testimony that accused No.1, i.e. Govindbhai Kantibhai, gave axe blow on head of his brother Rameshbhai, and accused No.8, i.e. Hargovanbhai Hirdas, gave blow with an axe on right hand of his brother. It is further stated by the witness that accused No.4, i.e. the

appellant No.2 herein Chhanabhai, accused No.29, i.e. Bhailalbai Babaldas, and accused No.21, i.e. Dipakbhai Shivram, gave stick blows on left hand of his brother. It is further stated by this witness that accused No.18, i.e. Shambhubhai Hirdas Patel, gave stick blow on his right hand palm whereas accused No.4, the appellant No.2 herein Chhanabhai Kanjibhai, accused No.21, i.e. Bhailalbai Babaldas, and accused No.21 Dipak Shivram gave stick blows to him and his left hand elbow was injured. It is asserted by this witness that accused No.9, i.e. Shankerbhai Ramdas, and accused No.11, i.e. Dahyabhai Hirdas, gave stick blows on his waist whereas accused No.17, i.e. Babubhai Kantidas, and accused No.5, i.e. Ambarambhai Keshavlal, gave stick blow on his left shoulder, and accused No.19, i.e. Shivabhai Ramchand caused injury on his right knee whereas accused No.28, i.e. Lalbhai, gave stick blows on his chest. According to this witness, Vithalbhai Babaldas came to rescue him and his brother but accused No.2 - appellant No.1 herein, caused injury on his head by an axe whereas accused No.20 Bhailalbai Manilal gave stick blow on head of Vithalbhai. It is also stated by the witness that accused No.2 - the appellant No.1 herein, i.e. Chhanabhai Kanjibhai, accused No.29 Bhailalbai Babaldas and accused No.21 Dipakbhai caused injuries to Vithalbhai by means of sticks. This witness has also asserted that his wife Dahiben, her daughter Anandi and Champaben - sister of injured Vithalbhai intervened to rescue them but they were also assaulted and injured.

11.1 Injured witness Vithalbhai Babaldas Patel examined at Exh.58 has stated that on the day of incident, he was present at his milk dairy situated near sim of his Village Chadasana. The witness has mentioned that on hearing commotion, he came out of his dairy and found that Lalbhai and Rameshbhai were being assaulted by the accused with dhariya, sticks, axes, etc. According to this witness, accused No.1, i.e. Govindbhai, gave dharia blow on head of Rameshbhai as well as on the elbow and hip of Lalbhai. The witness has maintained that he asked the accused to stop beating, but accused No.2 the appellant No.1 herein, i.e. Babubhai Ramdas, caused injury on his head and accused No.5, i.e. Ambalal Keshavlal, caused injury by means of dharia on his little finger. It is also stated by the witness that accused No.15, i.e. Natubhai Mohandas, caused injury on his left hand and hip. The witness has further asserted that his sister Champaben, Dahiben, wife of Lalbhai and Anandiben, daughter of Lalbhai, came to their rescue, but they were also assaulted and beaten.

11.2 Injured witness Anandiben Laljibhai examined at Exh.60 has stated that on hearing commotion, she and her brother Dahiben went to the place of incident and saw accused No.1, i.e. Govindbhai Kantibhai, inflicting an axe blow on head of his uncle Rameshbhai. It is further stated by the witness that her father and uncle were being assaulted without any restraint. According to this witness, injured Vithalbhai was caused injury on his head by Patel Babulal Ramdas, i.e. the appellant No.1, with an axe and when she and her mother intervened, accused No.29, i.e. Patel Bhailalbhai Babaldas, and accused No.21, i.e. Dipak Shivram, gave stick blows on her both the thighs. The witness has also mentioned that her mother Dahiben was caused injury on her back and left hand by accused No.11, i.e. Dahyabhai Hirdas, and accused No.28, Laljibhai Mohandas.

11.3 Injured witness Dahiben Lalbhai examined at Exh.61 has stated before the Court that on hearing commotion, she in the company of her daughter Anandi and Champaben went running to the place of incident and found that thirty-one accused including accused Govindbhai were assaulting her husband and brother-in-law. According to this witness, accused No.1, i.e. Govindbhai gave axe blow on head of Rameshbhai whereas the appellant No.1 herein, i.e. Babubhai Ramdas, gave axe blow on head of Vithalbhai. The witness has asserted that accused No.11, i.e. Dahyabhai Hirdas, gave two stick blows on her back and two stick blows were also given to her by accused No.20, i.e. Bhailalbhai Manilal. The witness has claimed that her daughter Anandi was given stick blow on her left thigh by accused No.29, i.e. Bhailalbhai Babaldas, whereas accused No.21, i.e. Dipakbhai, gave stick blows on both the thighs of her daughter.

11.4 Injured Champaben examined at Exh.62 has stated in her testimony that on hearing commotion, she went to chawk and saw that accused were assaulting her brother Vithalbhai as well as Rameshbhai and Lalbhai. According to her, accused No.1, i.e. Govindbhai, caused injury on head of Rameshbhai by means of an axe whereas the appellant No.1, i.e. Babubhai, gave blow with an axe on head of her brother Vithalbhai and accused No.20, i.e. Bhailal also gave stick blow on head of her brother. The witness has maintained that accused No.5, i.e. Ambalal, inflicted dharia blow on palm of her brother and injured his little finger. What is asserted by the witness is that when she intervened, accused No.18, i.e. Shambhubhai, gave stick blow on wrist of her left hand whereas Dahiben was given stick blow on her back by accused No.11 Dahyabhai Hirabhai and also on her hand by accused No.28, i.e. Lalbhai. The

witness has claimed that accused No.29, i.e. Bhailalbhai, and accused No.21, i.e. Dipakbhai, caused injury with sticks on both the thighs of Anandi.

11.5 It may be mentioned that though the witnesses were examined after lapse of long time in the year 2003, they are supported by medical evidence on record. Some inconsequential omissions have been brought on record but they do not affect the substratum of the prosecution case.

12. It is true that three female witnesses have not stated in their respective testimony that the appellant No.2 assaulted the complainant. However, reading the evidence of six injured witnesses, it becomes at once clear that first of all, complainant Rameshbhai was assaulted. Thereafter, his brother Lalbhai was assaulted and, thereafter, injured Vithalbhai. The three ladies went to the place of incident after sometime, i.e. after the complainant was assaulted by the appellant No.2. Naturally, therefore, they could not have narrated that part of the incident which was not witnessed by them. In fact, absence of reference to the fact that the appellant No.2 assaulted the complainant persuades the Court to come to the conclusion that rustic witnesses have narrated the incident in simple manner and that they were not tutored. It is relevant to notice that the complainant was assaulted by several members. Those who came to his rescue were also assaulted by the members of unlawful assembly. Merely because female witnesses have not referred to presence of the appellant No.2 at the place of incident, one need not jump to the conclusion that the appellant No.2 was not a member of the unlawful assembly. As noticed earlier, the complainant has specifically and categorically asserted before the Court that he was also assaulted by the appellant No.2 with stick and that the appellant No.2 caused injuries on his left hand. The complainant stands completely corroborated by the testimony of Medical Officer, who examined him within no time of the incident. Section 134 of the Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact. When number of witnesses are assaulted by the members of unlawful assembly, normally, their attention would be focussed on their respective assailants. Under the circumstances, absence of reference to presence of the appellant No.2 would not indicate that the appellant No.2 was not a member of unlawful assembly. Thus, the appellant No.2 is not entitled to get any benefit on the ground that the prosecution has failed to establish that he was one of the members of unlawful assembly.

13. As far as formation of unlawful assembly is concerned, the same stands fully established by the reliable testimony of the complainant. It also stands established by the testimony of witness Lalchandbhai Balchandbhai Patel, who is examined at Exh.56. The testimony of injured witness Vithalbhai recorded at Exh.58 also shows that unlawful assembly was constituted and the members of the unlawful assembly assaulted him as well as complainant Rameshbhai and others. Similarly, testimony of injured witness Anandiben Laljibhai Patel, recorded at Exh.60, would also establish that unlawful assembly was constituted and the members of unlawful assembly had assaulted the complainant and others including her. The conjoint and meaningful reading of evidence of the complainant and five other injured witnesses establishes beyond pale of doubt that there was an unlawful assembly and the members of that unlawful assembly were the appellants as well as original accused Nos.1, 5, 7, 9, 10, 11, 15, 17,18, 19, 20, 21, 23, 28 and 29.

14. The plea that Section 149 of the IPC is not attracted to the case of the appellants and, therefore, the impugned judgment should be set aside is merely stated to be rejected. The testimony of the complainant would show that the appellants along with others, who were members of the unlawful assembly, were waiting for the complainant to come. They were duly armed with weapons. The reliable evidence of the witnesses adduced by the prosecution further establishes that the accused appellants participated in actual assault on the complainant and his relatives. It is nobody's case that they were curious onlookers without intending to entertain common object of the assembly nor does the evidence on record establish that that they were merely passive witness to the incident. In fact, they armed themselves in the early morning of the day of incident when normally people would be busy doing daily routine work such as taking bath, performing religious rites, etc. Both the appellants knew very well that other accused such as accused No.1 were armed with deadly weapons. All the accused jointly mounted attack on the complainant and those who come to his rescue. The reliable testimony of witnesses establishes that they actively participated in commission of crime. In the light of above noticed glaring facts, the Court will have to consider the question whether the provisions of Section 149 IPC are attracted. The principle of criminal liability is that it primarily attaches to the person who actually commits an offence and it is only such person that can be held guilty and punished for the offence. Section 149 IPC deals with liability for constructive criminality. The first

essential element of Section 149 IPC is that commission of offence by any person of unlawful assembly. The second part is that commission of offence was such as the members of that assembly knew was likely to be committed in prosecution of common object. In order to fasten vicarious liability on any member of the unlawful assembly, the prosecution must prove that any act constituting offence was done in prosecution of common object or act done was such as the members of that assembly knew was likely to be committed in prosecution of common object. The common object has to be gathered or inferred from various circumstances like nature of weapons, force used and injuries caused, etc. In inferring the common object of unlawful assembly, various factors depending upon the facts and circumstances of each case have to be taken into consideration. When common intention is established, it is not necessary for the prosecution to attribute overt act to each accused. It is true that mere presence in an unlawful assembly cannot render a person liable unless there is common object and he was actuated by that common object and that object is one of those set out in Section 141 IPC. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified in Section 141 IPC. The Supreme Court, in catena of decisions, has ruled that it cannot be laid down as a general proposition of law that an overt act must be proved against a person, who is alleged to be member of an unlawful assembly. Only thing required is that he should have understood that the assembly is unlawful and is likely to commit any of the acts which fall within the purview of Section 141. An object is entertained in human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. The 'common object' of an assembly is to be ascertained from the acts and the language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. There must be community of object and the object may exist only up to a particular stage and even thereafter. In view of salutary principles governing interpretation of Section 149 IPC, the plea that appellant

No.2 did not cause serious injury to the complainant and, therefore, the impugned judgment is liable to be set aside cannot be accepted. As observed earlier, the appellants were the members of unlawful assembly and they were duly armed. They assaulted the complainant and others, who came to the rescue of the complainant. After three injured, i.e. complainant, his brother Lalbhai and Vithalbhai, fell down, all of them dispersed together. It is not the case of the appellants that they attempted to dissuade any other member of the unlawful assembly from assaulting the complainant and others, who came to the rescue of the complainant. It is relevant to notice that in this case thirty-one accused were charged with commission of offence under Section 307 r.w. 149 IPC and only those who actively participated are convicted. Though this approach of the trial Court can be examined if the State files an appeal challenging acquittal of others, there is no manner of doubt that the appellants, who were members of the unlawful assembly since the beginning, shared the common object of the assembly. Therefore, invocation of Section 149 IPC by the prosecution cannot be regarded as erroneous. The decisions cited at the Bar by the learned counsel of the appellants turn on their facts and principles laid down therein do not apply to the facts of the case. Therefore, detailed reference to them is avoided by this Court.

15. The submission that the record does not establish that an attempt was made to murder the complainant and, therefore, conviction under Section 307 r.w. 149 IPC is liable to be set aside, has also no merits. According to the complainant, first of all, he was assaulted with an axe and injury was caused to him on his head. His evidence would further show that thereafter, he was assaulted by different accused with different weapons on different parts of his person. As far as Section 307 IPC is concerned, to justify conviction under Section 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. Although nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. In fact, the section makes a distinction between an act of the accused and its result, if any, and such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. The manner in which the complainant Rameshbhai was assaulted and, thereafter as many as five witnesses who came to his

rescue, were assaulted, leaves no doubt that the common object of members of the unlawful assembly was to attempt murder of the complainant. If there had been no intention to attempt murder of the complainant, the complainant, who was totally unarmed, would not have been assaulted in the manner in which he was assaulted by the members of unlawful assembly. The medical evidence of Dr.Pravinkumar Soni establishes that the complainant was bleeding from head whereas the evidence of Dr.Shobhaben shows that witness Lalbhai sustained fractures and injured Vithalbhai sustained dislocation of little finger over and above other injuries noticed by the two Medical Officers. Having regard to the facts and circumstances of the case, the conviction of the appellants under Section 307 r.w. 149 IPC cannot be regarded as erroneous more particularly in view the decision of the Supreme Court in State of Maharashtra v. Balram Bama Patil & Ors. (supra). The power to dismiss the appeal summarily conferred by Section 384 of the Code is meant to be exercised in fit cases. If this Court is fully satisfied that the finding of guilt is unexceptionable, the appeal cannot be conscientiously admitted, for, to do so would be to shirk our responsibility, particularly in view of the fact that to admit one worthless matter where there is no point or purpose is to postpone the day of deliverance of a convict in jail who has a meritorious matter or to postpone redress to litigants suffering injustice because of the delays in Courts. Hence, this Court is duty bound to exercise the power to dismiss the appeal summarily if this Court sees no substance in the matter and this Court means to do so in the present appeal. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the learned Sessions Judge is pointed out. The evidence has been carefully analyzed and fully appreciated in the reasoned judgment with which this Court fully concurs. On reappraisal of evidence, this Court finds that conviction of the appellants under Section 307 r.w. 149 and 323 r.w. 149 IPC is well founded and no case is made out to intervene with the same in instant appeal.

16. This brings the Court to consider the question whether the sentence imposed on the appellants is harsh. It is true that the learned Judge heard the appellants on question of sentence. However, the evidence on record indicates that the incident in question took place on September 22, 1995, i.e. almost before a decade. The appellants have undergone trauma of trial and sentence. It could not be pointed out by the learned Additional Public Prosecutor for the State that the appellants have bad antecedents. Further, the learned Judge has directed

that out of the amount which may be recovered by way of fine from the accused, complainant Rameshbhai should be paid Rs.50,000=00 (Rupees Fifty Thousand Only) as compensation under Section 357 of the Code whereas his elder brother Lalchandbhai and injured witness Vithalbhai each should be paid Rs.25,000=00 (Rupees Twenty Five Thousand Only) by way of compensation. On the facts and in the circumstances of the case, this Court is of the opinion that interest of justice would be served if the sentence of R.I. for ten years imposed on the appellants for commission of offence punishable under Section 307 r.w. 149 IPC is reduced to R.I. for seven years.

17. For the foregoing reasons, the appeal partly succeeds on the question of sentence. The conviction of the appellants under Section 307 r.w. 149 IPC as well as Section 323 r.w. 149 IPC recorded by the learned Judge of the trial Court is hereby maintained. Each appellant is sentenced to R.I. for seven years and fine of Rs.10,000=00, in default, R.I. for two years, for commission of offence punishable under Section 307 r.w. 149 IPC as well as R.I. for one year and fine of Rs.1,000=00, in default R.I. for three months, for commission of offence punishable under Section 323 r.w. 149 IPC. The order of compensation passed by the learned Judge is hereby confirmed. The appeal is partly allowed to the extent indicated hereinabove. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M. Panchal, J.)

(S.R.Brahmbhatt, J.)

Rajendra